Compelling journalists to disclose sources

Notes for RNZ slot from Ursula Cheer (Associate Professor) Canterbury University, 15 September 2010.

1. Courts continue to struggle world-wide with the issue of whether journalists should have immunity or privileges preventing them from being compelled to disclose confidential sources. There have been few subpoenas issued to journalists over the years in New Zealand but none have resulted in imprisonment. It is apparent police have been reluctant to involve journalists in criminal proceedings and where they have been, courts have worked hard to find pragmatic solutions.
2. Today I can at last discuss a New Zealand High Court decision made some time ago and compare it to a European decision about an English case. The NZ decision was actually made late in 2009 but the reason I have had to wait to discuss it is because it arose in the context of the trial process for the notorious medal thieves. They have now both been sentenced for the offence and so this aspect of the process can now be discussed.
3. No doubt most people recall that early in 2008, an interview with the alleged war medal thief by New Zealand broadcaster John Campbell was broadcast on *Campbell Live.* Introducing the interview, Mr Campbell assured viewers that nothing had been done to reveal the man's identity and that no payment of any sort had been offered. The man was referred to by a pseudonym. The interview which followed was just under five minutes in length, with the interviewee appearing as a silhouette of a hooded figure. After the interview, viewers were advised that an actor's voice had been used, but no changes had been made to what was actually said in interview.

4. The interview had actually taken place earlier in the day in a hotel, where the alleged thief had been recorded on audio only. In fact, an actor was used to broadcast the interview that evening, using a transcript of the real interview.
5. The police were able to make arrests in the case and then applied for an order under s 68 of the Evidence Act 2006 compelling John Campbell and five of his production team to produce relevant information at depositions and at trial relating to the alleged burglary. Mr Campbell refused to disclose the identity of the man throughout. This was the first time this provision containing a new presumption of non-compulsion for journalists where disclosure of sources is at risk has been tested. Despite the presumption, journalists do remain ultimately compellable where a judge finds there is greater public interest in disclosure.
6. Justice Randerson in the High Court dealt with the matter extremely sensitively in an interim judgment and reached a final decision three weeks later having heard further from counsel in the case. The Court heard arguments from the media as to the possible chilling effects on media sources if there was doubt about the ability of media to protect those sources. Mr Campbell was convinced he could not have got the story without giving an undertaking not to disclose, and did so relying on his understanding of the new statutory immunity, which he nonetheless recognised was not absolute but only to be overridden in very limited circumstances.
7. Further evidence was put forward by Gavin Ellis to the effect that journalists should not give guarantees of confidentiality lightly and must be satisfied the source has relevant, direct knowledge of a matter of sufficient public interest, where the information cannot be obtained any other way. Having done so, however, such guarantees are to be honoured

whether the journalist is acting in a 'watchdog' role in relation to state activities or merely serving the public in the dissemination of information of general public interest. Mr Ellis suggested that only two circumstances could justify the breaking of a guarantee of confidence – where harm to personal health or safety would otherwise result or a serious crime would be committed, or where the journalist becomes aware of ulterior motives which would have justified refusal of the guarantee.

8. The police in response put forward evidence from journalist and lawyer Steven Price which questioned the assumption that a chilling effect would automatically follow from an order compelling Mr Campbell to disclose, and also questioned the ability of any party to measure the extent of any such effect. Further, Mr Price suggested that most ordinary, off-the-record conversations with sources would not be chilled, and that most informants would probably assess any risk of disclosure against the similarities between their situation and other cases where disclosure had been made. This evidence was accepted by the judge as demonstrating that arguments about a chilling effect have not been tested empirically and are therefore predictive rather than conclusive.
9. The Court then examined the history of such protection in New Zealand. In particular, the previous legislation contained a clause allowing a court to excuse witnesses after balancing the public interests involved. The power to excuse was an exception to a presumption of compulsion which the new Evidence Act has reversed. Previous cases dealing with that provision had recognised, however, that the public interest in the media's role should not be discounted lightly.
10. Randerson J also examined English law, where greater protection is now provided under the Contempt of Court Act than existed before, though the ultimate power of compulsion similarly still remains. However, the

judge did not discuss a recent decision of the European Court of Human Rights in *Financial Times Ltd v the United Kingdo*m which came after *Campbell* and examined the English provision in the light of European law.

11. *Financial Times* was an application by media alleging that an order made by the High Court as long ago as 2001 to deliver up certain documents to a Belgian brewing company, Interbrew, was in breach of the right to the freedom of expression contained in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The documents did not contain direct evidence but might have disclosed the source of some leaked and possibly inaccurate information about the company.
12. The European Court found that orders to disclose sources interfere with freedom of expression and therefore to survive, an order must have a legitimate aim and be necessary in a democratic society. This is most likely to be satisfied where an order is sought to prevent crime, but is more difficult to justify where you have private parties in a breach of confidence setting.
13. The European Court scrutinises restrictions on confidentiality of journalistic sources very closely. The Court referred to an earlier decision in a case called *Goodwin* involving private parties and confidential information, where an order to disclose was not upheld. In the end, Interbrew's interests in preventing future damage arising from possible publication of confidential information by identifying and pursuing the unknown confidence breaker and seeking damages for past breaches, were insufficient to outweigh the public interest in the protection of journalist's sources. The *Financial Times* decision suggests that while there is no need for an absolutist position to be taken to freedom of expression, the starting point should always be a presumption that

disclosure of sources is contrary to the public interest, and requires something exceptional to displace it.

14. To return to New Zealand, in *Campbell*, Justice Randerson confirmed that the starting point here is no obligation on journalists to disclose, but with potential for that immunity to be displaced. The party seeking displacement must make the case. Justice Randerson thought the New Zealand provision is different from the United Kingdom requirements. He saw our provision as clearly requiring balancing, which is an evaluative judgment made up of fact and degree. So Justice Randerson would not state a threshold similar to that in *Goodwin* and *Financial Times*. Protection is not to be overridden easily in New Zealand, but no high threshold is assumed, such as requiring truly exceptional or compelling circumstances. However, he did emphasise that freedom of expression is to be given substantial weight both in a narrow sense relating to protecting sources, and a broad sense. Hence, the presumptive right to protection is not to be displaced lightly and only after careful weighing.
15. A number of issues will be relevant in the weighing exercise. These are whether other means are available to obtain the information, the status of the evidence in the prosecution case, the nature of the charge, adverse effects arising from disclosure on the informant or others, and chilling effects arguments.
16. After considering the facts in *Campbell* in detail, the judge indicated his inclination to make an order for disclosure. However, he asked counsel to consider the matter further and return to him with further submissions. About three weeks later, he dismissed the application after Mr Campbell produced a 'will say' statement with some information in it. The judge treated this as voluntary disclosure of material which could otherwise be protected under the statute. This meant that a disclosure order was no

longer necessary and the order was dismissed on the understanding that Mr Campbell would provide a statement to police on the basis of his will-say statement to the Court.

17. I think the decision illustrates that although there is now a presumption in favour of media contained in the New Zealand statutory provision, the courts are still inclined to carry out a fact specific weighing exercise when applying it. This seems akin to the approach still taken by the domestic courts in the United Kingdom and frowned on by the European court.

18. I think that if the New Zealand Bill of Rights had been applied more closely to the new provision, the presumption in the section in favour of non-disclosure would have carried more weight and would be displaced only in exceptional circumstances, as suggested in *Financial Times*. Would this have resulted in a decision closer to that in *Financial Times*? Perhaps not. This is because *Campbell* involved an application to compel the journalist in order to facilitate a prosecution for a serious criminal offence, in contrast to both *Goodwin* and *Financial Times*, which involved private claims for breach of confidence. So ultimately, disclosure in *Campbell* might well have been justified overall.

19. New Zealand courts do their best to assist media to protect their sources but still reserve the right to exercise compulsion at the end of the day. While I see nothing wrong in maintaining a pragmatic approach to the issue and a healthy scepticism about the abstract predictions of any chilling effect, I would prefer the presumption against disclosure in the Evidence Act to operate as a true presumption rather than a more open-ended discretion as suggested in the *Campbell* case.